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No. _____
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HARRIS COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSIONERS LEON GOLDSTEIN, JOHNNY ISBELL, ROBERT BENNETT, HARRIS COUNTY SHERIFF JOHNNY KLEVENHAGEN, HARRIS COUNTY SHERIFF'S DEPARTMENT CIVIL SERVICE COMMISSION & HARRIS COUNTY, TEXAS,

Petitioners,

vs.

S.W. STEVERSON, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Fifth Circuit sanctioned the district court's departure from the accepted and usual course of proceedings as to call for an exercise of the Supreme Court's power of supervision, where the district court erroneously concluded and instructed the jury that as a matter of law, the Harris County Civil Service Commission's "modification" of Respondent's disciplinary suspension from three days to an additional seven days violated Respondent's substantive due process and equal protection guarantees?

II. Whether the Fifth Circuit sanctioned the district court's departure from the accepted and usual course of proceedings as to call for an exercise of the Supreme Court's power of supervision, where the district court erroneously concluded as a matter of law that the 1991 Civil Rights Act retroactively applied to Respondent's retaliation claims and thus subjected Petitioners to liability for compensatory damages, rather than limiting liability to equitable relief in accordance with the law in effect prior to enactment of the Act?

III. Whether the Fifth Circuit sanctioned the district court's departure from the accepted and usual course of proceedings as to call for an exercise of the Supreme Court's power of supervision, where the district court erroneously concluded as a matter of law that Respondent's retaliation claims could be advanced under 42 U.S.C. §§ 1981 and 1983, and thus subjected Petitioners to liability for compensatory damages, rather than limiting liability to equitable relief?

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IN THE
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S.W. STEVERSON, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Harris County Sheriff's Department Civil Service Commissioners Leon Goldstein, Johnny Isbell, Robert Bennett, Harris County Sheriff Johnny Klevenhagen, Harris County Sheriff's Department Civil Service Commission and Harris County, Texas, respectfully pray that a writ of certiorari issue to review the judgment, opinion and order on petition for rehearing of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 24 F.3d 666 (5th Cir. 1994), and is reprinted in the appendix hereto. (Pet. App. A, pp. 1a-10a). The findings issued by the United States District Court for the Southern District of Texas (Hoyt, D.J.) have not been reported. They are reprinted in the appendix hereto. (Pet. App. B, pp. 11a-21a)

JURISDICTION

A jury rendered its verdict in Respondent's favor in this employment discrimination and retaliation case on January 14, 1992. (Pet. App. C, pp. 22a-39a). United States District Judge Kenneth Hoyt issued findings of fact and conclusions of law in this case on February 14, 1992. (Pet. App. B, pp. 11a-21a). Judge Hoyt issued final judgment on March 30, 1992. (Pet. App. D, pp. 40a-41a). On County Petitioners' appeal and Respondent's cross-appeal, the Fifth Circuit affirmed on June 15, 1994. *Steverson v. Goldstein*, 24 F.3d 666 (5th Cir. 1994); (Pet. App. A, pp. 1a-10a). The Fifth Circuit denied County Petitioners' petition for rehearing on July 21, 1994. *Steverson v. Goldstein*, 24 F.3d 666 (5th Cir. 1994); (Pet. App. E, pp. 42a-43a). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Constitutional and Statutory provisions involved in this case are included in the Appendix. (Pet. App. F, pp. 44a-50a).

STATEMENT OF THE CASE

Respondent, a Harris County deputy sheriff, filed an employment discrimination and retaliation lawsuit against Harris County, the Harris County Sheriff's Department Civil Service Commission, its commissioners, Leon Goldstein, Johnny Isbell and Robert Bennett, and against Johnny Klevenhagen, the duly elected Sheriff of Harris County, under 42 U.S.C. §§ 1981, 1983 and 2000e and the First, Fifth and Fourteenth Amendments to the Constitution. Respondent alleged that the Sheriff, the Commission and its members subjected him to disparate disciplinary treatment because of his race and because he participated in a class action Title VII lawsuit. Respondent also alleged that the Sheriff retaliated against him for campaigning on behalf of the Sheriff's opponent in the 1988 sheriff's race. The case was tried before United States District Judge Kenneth Hoyt, sitting with a jury in January, 1992.

The Watkins' Club Incident

At trial, Respondent, an African American, testified that he has been employed as a Harris County Deputy Sheriff since 1979. (R. 424; Tr. IV, 151.) During the evening of February 27 and the early morning hours of February 28, 1988, while he was off duty, Respondent was working as a security guard at the U. W. Watkins' Country Club in Houston, Texas. (R. 424; Tr. I, 176.) That evening, the Prairie View Trail Riders' dance was taking place at that facility. (Tr. I, 176.) Patrons attending the dance were predominantly African American. (Tr. IV, 178.) Henry Lewis and Denise McNeil, another off-duty Harris County Deputy Sheriff, were also performing security guard duties at the Watkins' Club that evening. (Tr. IV, 176, 178.) At about 10:00 p.m., Lewis noticed a suspicious vehicle at the building located adjacent to the Watkins' facility and reported this observation to Deputy McNeil. (Tr. IV, 178.) Deputy McNeil notified the Houston Police Department dispatch. (*Id.*) No police unit came. Respondent telephoned the Harris County Sheriff's dispatch to report the attempted burglary. (Tr. IV, 179.)

Harris County Deputy Sheriff Kevin Moneyhun was dispatched to investigate. (Tr. VII, 646.) Moneyhun met Lewis in the lot of the club, where Lewis explained that he had observed a vehicle pull to the side of the building and saw several persons enter the building. (*Id.*) Lewis also indicated that he had relayed the information to an unidentified deputy at the club. (*Id.*) Moneyhun then spoke with Deputy McNeil, whom he had noticed outside the club. (Tr. VII, 647-48.) When he could learn no information other than that derived from Lewis, he proceeded to the scene where the burglary was alleged to have occurred. (Tr. VII, 648.) Moneyhun noted that the door had been forced, and believing the suspects to have departed, entered the building. (*Id.*) When, during, the course of his rounds, he heard a noise in the attic of the building, he retreated to the outside and summoned backup units by radio to help secure the facility. (*Id.*)

Sergeant Mark Walker and Deputy Haley arrived to assist. (Tr. VII, 650.) After checking the building and finding no suspects present, Walker, followed shortly thereafter by Haley, proceeded to the Watkins' club to talk with the deputy who had reported the burglary. (*Id.*) Deputy Moneyhun was instructed to await the arrival of a representative of the telephone company, the owner of the building. (*Id.*) When notified that the representative would arrive in thirty minutes, Moneyhun proceeded to the Watkins' club. (*Id.*) There, while observing Sergeant Walker conversing with Deputy McNeil, Moneyhun saw a man, later identified as Dr. Watkins, come from inside the club and begin to curse and scream at Sergeant Walker and Deputy McNeil, ordering them to depart from the premises. (Tr. IV, 184; V, 249-50; VII, 655.) Thereafter, Sergeant Walker instructed Deputy Moneyhun to take Watkins into custody. (Tr. I, 186-87; VII, 656.) Moneyhun advanced towards Watkins to comply with Sergeant Walker's request. (*Id.*) A small crowd of twenty or so individuals had gathered at the front of the club. (Tr. V, 252; VII, 656.) At that point, Respondent passed between Moneyhun and Watkins and said "Hold on, you ain't arresting anybody." (*Id.*) Respondent then went to Sergeant Walker and told him that he and the other deputies "didn't need to be coming on the property harassing people or putting anybody in jail." (Tr. VII, 657.) At that point, Watkins was restrained by Robert Connor, another off-duty deputy, and

Deputy Moneyhun again focused his attention on the conversation between Sergeant Walker and the Respondent. (*Id.*) Deputy Moneyhun heard Respondent state that "you all [meaning Sergeant Walker, Deputy Haley and Moneyhun] don't need to be out here causing any problems." (Tr. VII, 658.) Walker replied, "There weren't any problems until you came out here acting like an idiot." (*Id.*) According to Respondent, Sergeant Walker called him [Respondent] a "stupid ass hole" twice. (Tr. VI, 186.) Respondent admittedly responded by telling Sergeant Walker, "No, you're the asshole." (Tr. IV, 186.) According to Deputy Moneyhun, Respondent appeared to be angry, and had situated himself less than a foot from Sergeant Walker and began stating, "I'm not the idiot, you're the idiot." (Tr. VII, 659.) Elijah Russell, one of the patrons, testified that Sergeant Walker, who is white, used profanity towards Respondent and that both Respondent and Sergeant Walker could be heard above the ambient crowd noises. (Tr. V, 373, 276-77.) Russell testified further that he could not remember what was said. (Tr. V, 276.) There is no dispute that a crowd had gathered and was watching Sergeant Walker and the Respondent argue. (Tr. I, 187; IV, 186; VII, 661.) Respondent then turned and went back inside the club and the crowd dissipated. (Tr. IV, 186; V, 276-77; VII, 661.)

After Respondent's confrontation with Sergeant Walker, Respondent lodged a complaint with Sheriff Klevenhagen. (Tr. IV, 190.) Thereafter, Klevenhagen advised Respondent to put his complaint in writing and to submit it to the Internal Affairs Division (IAD). (*Id.*) Respondent prepared a report of the incident, secured the permission of his supervisor, and submitted the report to the Internal Affairs division. (Tr. IV, 193; V, 317.) Ronald Phillips, assigned to IAD, advised Respondent to try working his problem out with Sergeant Walker. When Respondent persisted with pursuing his complaint, Phillips investigated and submitted his findings to a board of majors. (Tr. IV, 193-95; V, 317.) A board of majors reviewed the case. (Tr. VI, 423-24.) Respondent received a three day suspension and a ninety day probationary period. (Tr. IV, 196; VI, 423-24.) Sergeant Walker received a written reprimand. (*Id.*) Both were cited with violating Rule 12.24 of the Harris County Sheriff's Department Policy and Ethics Manual, which provides that "[a]n employee shall not use threatening, vulgar or insulting

language or behave in an arrogant manner toward any other member of the department, public or prisoners in custody of the department." (Tr. VI, 424; PX. 33, 56.) The Policy and Ethics Manual further provides that employees of the Sheriff's Department shall not speak critically or derogatorily of others in the department about orders or instructions issued by supervisors. (Tr. VI, 419.) The Policy and Ethics Manual also provides that where there is sound reason to believe that such orders or instructions are unjust or inconsistent, a subordinate should respectfully or privately call it to the attention of a supervisor. (*Id.*)

The Board of Majors recommended no probationary period for Respondent. Dr. Mark Kellar, the head of the Criminal Justice Bureau to which Respondent was assigned, imposed probation, citing as authority for doing so Rule 8.01 of the Civil Service Commission Rules and his usual practice of doing so. (Tr. VI, 428-30.)

Upon the issuance of disciplinary action, a deputy is entitled to appeal to the Sheriff and then to the Harris County Sheriff's Department Civil Service Commission. (Tr. IV, 198-200; PX. 7.) The civil service commission rules provide that suspensions shall be for just cause only. (*Id.*) Rule 12.04(I) of the civil service commission rules provides that the Commission may: (1) uphold the disciplinary action of the Sheriff; (2) modify the disciplinary action as it may deem appropriate; or (3) grant the relief requested by the appeal and reinstate the employee. (*Id.*)

In April, 1988, Respondent received his initial disciplinary letter. (Tr. IV, 196.) He appealed the initial disciplinary action consisting of the three day suspension and ninety day probationary period to Sheriff Klevenhagen, who did not change it. (Tr. IV, 211.) Thereafter, Respondent appealed his suspension to the Civil Service Commission. In January, 1989, after hearing, the Commission "modified" the suspension by imposing an additional seven day suspension period. (Tr. IV, 213-15; V, 351-52; PX. 27.) That same month, the Commission denied Respondent's request for reconsideration. (Tr. IV, 215-16; V, 351; PX. 31.) Petitioner Robert Bennett, one of the commissioners, voted to rescind the additional seven day period

imposed by the Commission and to uphold the initial amount of discipline imposed on Respondent. (Tr. V, 354-55.)

Respondent's Political & Legal Activities

Respondent testified at trial that he helped found an employee organization known as the African American Sheriff's Deputies League in 1984 to help black members of the sheriff's department. (Tr. IV, 162.) At trial, Respondent also testified that he was a participant in a class action Title VII lawsuit styled *Connor v. Harris County*. (Tr. IV, 213; VI, 403-04.)

The League opposed Sheriff Klevenhagen's election bid in 1984 and re-election bid in 1988. (Tr. V, 376.) On January 19, 1985, the League directed a letter to Klevenhagen. (Tr. V, 375.) The letter, authored by the League's president, Robert Connor, referenced four areas of concern, three of which related to the assignment of deputy sheriffs and one which related to a racial slur allegedly used by a supervisor who was not named in the letter. (Tr. IV, 164, 166; V, 375; PX 48.) The supervisor mentioned in the letter was not identified. At the January, 1992, trial, Respondent testified that the letter referred to slurs by Sergeant Walker. (*Id.*)

In June, 1985, Respondent, Connor and Lieutenant Joseph Williams attended a legislative subcommittee hearing purportedly to oppose a bill Klevenhagen favored. (Tr. IV, 167; VI, 465.)

Respondent testified that he and the League became involved politically and supported Klevenhagen's opponent in 1988. (Tr. IV, 201.) Respondent testified that he informed Klevenhagen personally in April, 1988 that the League and he would be supporting J. C. Mosier, Klevenhagen's opponent. (Tr. IV, 201-04.) Respondent also claimed that Klevenhagen asked him to ask Connor, a co-founder of the League, to drop the *Connor* lawsuit filed under Title VII. (*Id.* at 202.) Respondent testified that his political activities in support of Mosier consisted of attending a "Meet the Candidates" function at Texas Southern University with Klevenhagen's political opponent and participating with Mosier in a radio talk show on

Majic 102, a predominantly black radio station. (Tr. IV, 204-07; VI, 405-12.)

Although Respondent opined that Klevenhagen saw him with Mosier (Tr. IV, 205), Klevenhagen testified that he neither observed Respondent enter the room with Mosier at the Texas Southern University "Meet the Candidates" public presentation, nor heard Respondent on Majic 102. (Tr. V, 378-79.) Mosier testified that he did not know for a fact that Klevenhagen observed him entering the room at the Texas Southern University where the debate was scheduled. (Tr. VI, 412.) Klevenhagen also testified that he does not listen to Majic 102. (Tr. VII, 735.)

Personnel Actions Affecting Respondent

In April, 1988, Respondent received from Dr. Kellar his initial three day suspension letter based upon the Dr. Watkins' night club incident. (Tr. VI, 427-29; PX. 17, 18.) In June, 1988, Respondent was reassigned to duties in the records department of the detention bureau and a different shift. (Tr. IV, 206-07.) Sheriff Klevenhagen took no part in Respondent's transfer. (Tr. VII, 719-720.)

In an attempt to show a basis for alleged disparity in discipline between African American and white individuals employed in the Sheriff's Department, and over Petitioners' objection, Respondent presented evidence of an incident subsequent to his suspension for the Watkins' incident in which a *white* deputy who was purportedly involved in an altercation with a *black* supervisor received no discipline. This incident formed the basis for the District Court's finding of disparate discipline. (R. 422.)

Sergeant (later Lieutenant) Perry Winston, an African American, testified that on or about March 6, 1990, he had occasion to supervise Sandra McConnell, a white female deputy at the Harris County Jail. (Tr. V, 301-02.) When he instructed McConnell to inform another deputy to proceed to another quadrant of the jail (Tr. V, 302-03), McConnell purportedly made a derogatory comment. (*Id.*) According to Winston, when he instructed McConnell not to make derogatory remarks,

McConnell approached him, told him to get his hand out of her face, and struck him. (*Id.*) According to Winston, when he told McConnell to desist from her conduct, she struck him again, placed her hand on his chest, pushed him and walked out of the control center. (*Id.*) According to Winston, Captain Carl Borchers then gave him a written reprimand for lying. (*Id.*) Deputy McConnell received no discipline. (*Id.*) The record contains no evidence that the reprimand was appealed to the Sheriff or the Commission.

McConnell testified that Winston stood a few feet from her, and shook his hand in front of her face within inches and yelled at her in front of people. (Tr. VII, 701.) McConnell asked Winston to remove his hand from her face and told him that he did not need to speak to her in that manner in front of people. (*Id.*) When Winston continued his conduct, McConnell told him that if he did not remove his hands, she would. (*Id.*) According to McConnell, Winston persisted in his behavior and she pushed his hands out of her face. (*Id.*) When Winston brought his hand up in her face again as a fist, she pushed his hand away, turned and began to leave the jail floor control center to talk to the Lieutenant. (*Id.*) Winston told her that if she left the floor, "it would be [her] ass." (Tr. VII, 701-02.) According to McConnell, she obeyed Winston and remained on the floor until she was called down by the Lieutenant. (*Id.*) McConnell testified that she was not the recipient of any discipline. (Tr. VII, 706.)

The district court instructed the jury that, as a matter of law, the Commission violated Respondent's Due Process and Equal Protection rights under the Fourteenth Amendment because it increased the three day disciplinary suspension to ten days suspension. (Pet. App. C, p. 35a).

On January 14, 1992, the jury determined that Klevenhagen retaliated against Respondent for exercising his First Amendment rights to participate in the 1988 sheriff's race and for participating in a class action lawsuit against the Sheriff and County. (Pet. App. C, pp. 30a, 31a). The jury determined that Respondent's race played a part in the discipline meted out

by Klevenhagen, but not in the increased discipline given by the Civil Service Commission. (Pet. App. C, p. 31a). The jury found that as a matter of policy Klevenhagen disciplined black deputies more severely than white deputies, but that such policy was not a moving force in violating Respondent's constitutional rights. (Pet. App. C, p. 34a). The jury awarded Respondent $200,655.00 in lost earnings, personal humiliation, emotional distress and mental anguish. (Pet. App. C, p. 36a).

On February 14, 1992, the district court also entered its own findings of fact and conclusion of law. (Pet. App. B, pp. 11a-21a). The court held that the Commission lacked the power to increase discipline of an appealing employee beyond the discipline from which the appellant appealed, and had failed to give Respondent notice that the Commission could impose a harsher discipline than the discipline appealed. (Pet. App. B, p. 16a). The court further found that Respondent was given a three day suspension and placed on 90 days probation in retaliation for reporting the improper actions of Sergeant Walker. (Pet. App. B, p. 14a). The court held that Respondent was retaliated against for exercising his Title VII rights and in violation of his "due process" and "equal protection" rights under Section 1983. (Pet. App. B, p. 17a). The court found that Respondent lost more than $700.00 in back pay while on probation and was denied the opportunity to earn $11,500.00 from extra jobs while on probation and a "special" work schedule. (Pet. App. B, pp. 17a, 20a). On March 30, 1992, the court entered final judgment for Respondent and against Harris County, assessing $200,655.00 in "actual damages (42 U.S.C. § 1983)," $50,000.00 in attorneys' fees, $1,962.48 in court costs, and pre- and post judgment interest. (Pet. App. D, pp. 40a-41a).

Petitioners appealed in accordance with 28 U.S.C. § 1291. The Fifth Circuit affirmed. *Steverson v. Goldstein*, 24 F.3d 666 (5th Cir. 1994); (Pet. App. A, pp. 1a-10a). Petitioners argued, *inter alia*, that the district court erred in holding as a matter of law and instructing the jury that the civil service commission violated Respondent's rights to due process and equal protection by modifying his discipline. The court declined to assess this argument, finding that the jury verdict provided adequate alternative grounds for affirmance. (Pet. App. A, p. 6a). The court noted that the jury found that race played a part

in the commission's treatment of Respondent, found some evidence to support the jury's verdict, and concluded that Respondent could recover against Petitioners. (Pet. App. A, pp. 6a-7a).

Petitioners also urged on appeal that the district court erred by retroactively applying the damage provisions of the 1991 Civil Rights Act and by allowing Respondent to advance his retaliation claims under 42 U.S.C. §§ 1981 and 1983. The Fifth Circuit declined to address these arguments "because, regardless of their merit, the jury's findings require affirmance." (Pet. App. A, p. 7a). The court found some evidence to support the jury's finding that Klevenhagen retaliated against Respondent for political activity and concluded that "this finding, together with the jury's determination that racial animus was a motive for the Commission's and Klevenhagen's actions support the jury's verdict." (Pet. App. A, p. 8a).

On July 21, 1994, the Fifth Circuit denied Petitioners' petition for rehearing. (Pet. App. E, pp. 42a-43a).

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit sanctioned the district court's departure from the accepted and usual course of proceedings as to call for an exercise of the Supreme Court's power of supervision, given the district court's erroneous conclusion and instruction to the jury that as a matter of law, the Harris County Civil Service Commission's "modification" of Respondent's disciplinary suspension from three days to an additional seven days violated Respondent's substantive due process and equal protection guarantees.

The district court erroneously concluded and instructed the jury as a matter of law that the Harris County Sheriff's Department Civil Service Commission's modification of

Respondent's disciplinary suspension from three days to an additional seven days violated the substantive due process and equal protection clauses of the Fourteenth Amendment. This instruction effectively poisoned the jury and compelled them to find in Respondent's favor on each question and to award damages on his behalf. The Fifth Circuit permitted this departure from the accepted and usual course of proceedings so as to call for an exercise of this Court's power of supervision.

Respondent suffered no significant deprivation. An additional seven days suspension would not constitute a "significant" deprivation of a property interest. *See Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985).

Even assuming that Respondent suffered a significant deprivation, he received all the process that was due. Texas statutes and the Commission's Civil Service Regulations gave notice that the Commission was administering rules relating to his employment, including punishment. Under Texas law, the Commission "shall adopt, publish, and enforce rules regarding: ... (4) layoffs and dismissals; (5) disciplinary actions; (6) grievance procedures; and (7) other matters relating to the selection of employees and the procedural and substantive rights, advancement, benefits, and working conditions of employees." TEX. LOC. GOV'T CODE ANN. §158.035 (Vernon 1988). The Commission's regulations provide that they may modify any disciplinary action as they see fit. (Tr. IV at 200). Modification, by definition, means any change, whether by augmentation or diminution. E.g., Black's Law Dictionary (5th ed. 1979) (defining modify as follows: "[t]o alter, to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce. Such alteration or change may be characterized, in quantitative sense, as either an increase or decrease."). Even Respondent agreed that nothing in the Commission's rules said

that the Commission did not have the power to increase discipline. (Tr. V at 238).

In *P.A.F. Equip. Co. v. OSHRC*, 637 F.2d 741 (10th Cir. 1980), *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986 (9th Cir. 1975), and *American Tel. & Tel. v. F.C.C.*, 503 F.2d 612 (2d Cir. 1974), several circuit courts found no "chilling effect" and no due process violations where punishment was increased after each petitioner sought review of a citation.

In *American Tel. & Tel. Co. v. FCC ("AT & T")*, for example, the Second Circuit held that the Communications Act of 1934, which gave the FCC the power to "modify" its requirements, permitted the FCC to either increase or decrease a notice period for filing rate increases. According to the court, "[c]ertainly, to modify an opinion or an order, is not necessarily to reduce it but simply to change it, irrespective of any quantitative result." *AT & T*, 503 F.2d at 615.

In *California Stevedore & Ballast Co. v. OSHRC*, the OSHRC, which had the authority to affirm, "modify", or vacate the proposed penalty, or to direct other appropriate relief, imposed higher penalties upon a cargo company than those originally proposed by the Secretary. The company argued that the regulation misled it into believing that appeal of the hearing examiner's decision could not result in higher penalties and consequently deprived it of procedural due process. The Ninth Circuit found no procedural due process violation, finding that the company "misinterpreted on its own the consequences of a regulation." *California Stevedore & Ballast Co.*, 517 F.2d at 988-89.

In *Clarkson Construction Co. v. OSHRA*, 531 F.2d 451 (10th Cir. 1976), the Tenth Circuit found no due process violation given the Occupational Safety and Health Review

Commission increase in penalties, reasoning that the increased penalty could be imposed only by the Commission (rather than the Secretary) and was subject to judicial review. The Tenth Circuit found that the possibility of vindictiveness was thus negligible. *Clarkson*, 531 F.2d at 456.

In *P.A.F. Equip. Co. v. OSHRC*, the Tenth Circuit found that after issuance of a citation against a company for a serious violation of a safety standard (with a proposed penalty of $700.00) and the filing by the company of a notice challenging that violation, the Secretary of Labor was entitled to amend the citation to allege a willful violation (which increased the proposed penalty to $5,600.00). *P.A.F. Equip. Co.*, 637 F.2d at 742-43. In a hearing before an Administrative Law Judge, P.A.F. moved to strike the "willful violation" allegation, arguing that it substantially altered the cause of action and chilled its rights to contest citations. The ALJ denied the motion and upon reconsideration found that the amendment was improper. The Secretary filed a petition for review by the Commission. The Commission reversed the ALJ and found P.A.F. in willful violation of the Act, finding no "chilling effect" upon the company's right to contest citations. *P.A.F. Equip. Co.*, 637 F.2d at 742-43.

In addition to notice, Respondent had a pre-deprivation opportunity to respond to the Commission's modification of his discipline and a post-deprivation opportunity to avail himself of administrative and judicial remedies provided by Texas statute. *See, Loudermill*, 105 S.Ct. at 1496. Respondent filed a motion for reconsideration with the Commission prior to the imposition of the additional seven-day suspension. (Tr. IV 215; PX. 29). Texas law also permits "[a]n employee who, on a final decision by the commission, is demoted, suspended, or removed from a position [to] appeal the decision by filing a petition in the district court in the county within 30 days after the date of the decision," TEX. LOC. GOV'T CODE ANN. §158.037(a) (Vernon 1988), but Respondent failed to avail himself of this opportunity.

The district court also erred as a matter of law in instructing the jury that "the Commission violated the plaintiff's `equal protection' guarantees when they voted to increase the plaintiff's discipline," and in instructing the jury to that effect. (R. 325). Respondent contended that the Commission's failure to increase punishment for any employee excepting him violated his equal protection rights. Respondent apparently argued that an employment action which affects one black individual constitutes a *per se* violation of his equal protection rights. On the contrary, the equal protection clause "does not require that all public employees be treated alike." *Irby*, 737 F.2d at 1423 (citations omitted). The equal protection clause only requires that similarly situated persons should be treated alike.

The district court's due process and equal protection rulings effectively eviscerated the jury's function in deciding Respondent's claims, and misled them in understanding and deciding each of the issues presented for their review. *See, Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 300 (5th Cir. 1978). These rulings, viewed in conjunction with the balance of the charge, virtually commanded the jury to find in Respondent's favor on the issues presented and to award damages on his behalf.

(R-0420.) Thus, the district court found retaliation based upon the filing of an EEOC charge and a civil rights lawsuit (and not upon any exercise of free speech), yet incorrectly allowed recovery of compensatory damages under Sections 1981 and 1983.

It is well established that the civil rights statutes, including 42 U.S.C. §§1981 and 1983, do not create any substantive rights. They merely provide remedies for violations of the rights they designate. *Irby v. Sullivan*, 737 F.2d 1418, 1427-28 (5th Cir. 1984). In *Irby*, the Fifth Circuit held that Title VII provides the exclusive remedy for a violation of the terms of section 704(a) of that act, regarding retaliation. *Id.* at 1428. Consequently, the rights created by section 704(a) may not be asserted within the remedial framework of section 1983." *Id.* at 1428 (*citing, Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979)). Otherwise, as the this Court and the Fifth Court have reasoned, a complainant could "side-step the `detailed and specific provisions' of Title VII," ". . . bypass[ing] the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII." *Id.* at 1429. This Court also concluded that "`unimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of under §[1983].'" *Id.*

Here, the district court erroneously permitted Respondent to assert retaliation through Sections 1981 and 1983 even though this claim could only be asserted under Title VII. The district court's holding was based directly upon retaliation claims cognizable under Title VII (filing of an EEOC charge and a civil rights lawsuit and not upon any exercise of free speech), but not under Sections 1981 and 1983. The district court

erroneously allowed the jury to assess compensatory damages on a claim upon which only equitable relief could be recovered.

III.

The Fifth Circuit sanctioned the district court's departure from the accepted and usual course of proceedings as to call for an exercise of the this Court's power of supervision, where the district court erroneously concluded as a matter of law that Respondent's retaliation claims could be advanced under 42 U.S.C. §§ 1981 and 1983, and thus subjected Petitioners to liability for compensatory damages, rather than limiting liability to equitable relief.

The district court erroneously submitted the First Amendment issue to the jury, concluding that Respondent's speech addressed a matter of public concern and grounding First Amendment liability upon a vicarious liability theory.

In *Coughlin v. Lee*, two terminated deputy sheriffs sued Harry Lee, the sheriff of Jefferson Parish in Louisiana, claiming that they had been wrongly terminated in retaliation for their political activities. *Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991). Like here, the employees claimed that politically motivated speech by definition involved a matter of public concern. *Coughlin*, 946 F.2d at 1157 (5th Cir. 1991). In *Coughlin*, the Fifth Circuit found that issues rise to the level of a public concern when an individual speaks primarily in his role as a citizen rather than as an employee or when the information relayed is relevant to the public's evaluation of the performance of governmental agencies. *Id.* at 1157. Applying this rule, the Fifth Circuit stated that allegations of mismanagement or corruption as a result of the sheriff's administration might well have addressed a matter of public concern. Where, however,

neither deputy believed that his or her statements were indicative of improper behavior by the sheriff or accused him of corruption or breach of trust, the content of their speech did not address a matter of public concern. *Id.* at 1157-58. The *Steverson* record discloses no evidence showing that Respondent's speech accused Sheriff Klevenhagen of mismanagement, corruption, breach of trust, misbehavior or any other impropriety while campaigning for Klevenhagen's opponent. Consequently, Respondent's speech did not address a matter of public concern and should not have been submitted to the jury. *See*, *Coughlin*, 946 F.2d at 1157 (holding that where speech does not address a matter of public concern, a court will not scrutinize the reasons motivating discharge in retaliation for that speech). Similarly, Respondent adduced no evidence demonstrating that any protected speech was a substantial motivating factor in an employment action. *Id.*

Even if Respondent's speech had addressed a matter of public concern, the jury found that the Commission (the final policymaker on employment issues for the Sheriff's Department) did not retaliate against Respondent for the exercise of his First Amendment right to participate in the 1988 sheriff's race. *(R. 329).* Consequently, liability against Harris County was improperly grounded on a vicarious liability theory.

CONCLUSION

The district court incorrectly applied the 1991 Civil Rights Act retroactively, thus allowing Respondent to recover more than $200,000.00 in compensatory damages when the court itself found just more than $12,200.00 in equitable damages. (Pet. App. B, pp. 17a, 20a). At the very least, the compensatory damage award made in this case should be reversed.

For each of the above-referenced reasons, Petitioners ask this Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

LISA S. RICE
Counsel of Record
for Petitioners
Assistant County Attorney

MIKE DRISCOLL
County Attorney
Of Counsel

Appendix A

APPENDIX A – OPINION FILED JUNE 15, 1994 –IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2205

S. W. STEVERSON, JR.,

Plaintiff-Appellee,
Cross-Appellant,

versus

LEON GOLDSTEIN, ET AL.,

Defendants-Appellants.

LEON GOLDSTEIN, JOHNNY ISBELL
and JOHNNY KLEVENHAGEN,

Defendants,
Cross-Appellees.

Appeals from the United States District
Court for the Southern District of Texas

Before HIGGINBOTHAM and WIENER, Circuit Judges, KAUFMAN*, District Judge.

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* District Judge of the District of Maryland, sitting by designation.

Appendix A

HIGGINBOTHAM, Circuit Judge:

A jury concluded that the Sheriff and Civil Services Commission of Harris County discriminated against Shelby W. Steverson on the basis of race; and that the Sheriff retaliated against Steverson for activity protected by the First Amendment. The district court found for Steverson on a parallel Title VII claim and entered judgment against the County based on its own findings and the jury's verdict. Steverson argues on a cross-appeal that judgment should also have been entered against the Sheriff and others in their individual capacities. We AFFIRM.

I.

Shelby W. Steverson, an African American, has been employed as a Harris County Deputy Sheriff since 1979. During the evening of February 27 and the early morning of February 28, 1988, while serving as a private security guard at the U. W. Watkins' Country Club, Steverson became involved in a word fight with another officer, Sergeant Mark Walker.

Sergeant Walker has a history of using racial slurs. He has referred to African Americans in roll calls, for example, as "God damn niggers."[1] He also has used racial epithets to refer to members of the Harris County Sheriff's Department. Although the targets of these insults reported the incidents, the Department took no disciplinary action.

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1 When asked whether he considered the term offensive, he responded that, in context, it was not.

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On the night of February 27, 1988, Sergeant Walker had been called by Steverson's fellow security guards in response to an attempted burglary near the Watkins' Country Club. Walker arrived and entered the club. According to the district court, "Once inside the Club, Walker verbally attacked Steverson in a racial manner without cause and in the presence of the night club customers. Steverson advised Walker that Steverson would report Walker's improper decorum. Racial tensions grew." Walker left the club and its owner followed him. The owner objected to Walker's treatment of Steverson. Steverson intervened. Walker and Steverson exchanged angry words. The situation became heated because Walker was white while Steverson, the club owner, and most of the patrons of the club were black. Witnesses testified that violence threatened to ensue but in the end the parties went their separate ways in peace.

The next day Steverson reported the incident. Johnny Klevenhagen, the sheriff of Harris County, declined to process Steverson's complaint. When Steverson submitted the complaint to the Internal Affairs Division, he was told to resolve the issue informally. Steverson nevertheless pursued the matter. After the Department assessed the incident, Steverson was given a three-day suspension followed by a ninety-day probationary period. Sergeant Walker received a written reprimand.

Steverson appealed this result to Sheriff Klevenhagen, but to no avail. Steverson then asked the Harris County Sheriff's Department Civil Service Commission to review the sentence. Before the Commission heard the appeal, Steverson joined as a named plaintiff in a class action suit accusing the Department of discriminating on the basis of race. After hearing Steverson's appeal, the Commission increased Steverson's sentence to include seven more days of suspension. In several hundred cases

the Commission had heard in the past, it had both decreased and affirmed but had never increased a sentence.

Steverson attributes his discriminatory treatment to race and his political activities. These activities included filing a class action Title VII suit against the Harris County Sheriff's Department, and founding and participating in an organization known as the African American Sheriff's Deputies League. The League opposed the election of Klevenhagen to the office of Sheriff of the County, and Steverson publicly endorsed a competing candidate, J.C. Mosier, for the position. Steverson spoke on the radio in favor of Mosier and attended a meeting with Mosier at which Klevenhagen was also present. Five days after Steverson spoke on the radio, he received an assignment requiring him to work undesirable hours. Steverson's new shift began at 6:00 pm and ended at 2:00 am, making it impossible for him to continue his private employment as a security guard. No other member of the Sheriff's Department had to work these hours.

The district court found as a matter of law that the Civil Service Commission violated Steverson's due process and equal protection rights by augmenting his sentence and, "out of an abundance of caution," made findings of fact. The court submitted to the jury Steverson's claims under 42 U.S.C. §§ 1981 and 1983 of discrimination on the basis of race and of retaliation for his Title VII lawsuit and his political activities. The jury found that Klevenhagen discriminated against Steverson on the basis of race and retaliated against him on the basis of political activities, that race played a part in the Commission's decision to augment Steverson's sanction, and that Sheriff Klevenhagen had a policy of discriminating against African Americans. But it also found that the policy was not a moving force in the violation of Steverson's constitutional rights. The

jury awarded Steverson compensation in the amount of $200,655.

II.

The County[2] contests the jury's award of damages as founded on erroneous legal reasoning and as supported by inadequate evidence. The district court's conclusions of law and the jury's findings of fact provide various independent bases for affirming the judgment. We will affirm the judgment if any of these bases enjoys an adequate support in fact and law.[3] Because the County did not move for a directed verdict on its own behalf or on behalf of Sheriff Klevenhagen, we will affirm if any evidence supports the jury's verdict.[4] Finally, we will

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2 We will refer to the defendants collectively as the County, except where we must distinguish among them.

3 *See Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n*, 885 F.2d 266, 271 (5th Cir. 1989) (noting that affirmance is appropriate "when the reviewing court can be reasonably certain that the jury did not base its verdict on an unsound theory") (citations and internal quotation marks omitted).

4 *Bunch v. Walter*, 673 F.2d 127, 130-31 (5th Cir. 1982) (citation and internal quotation marks omitted) (allowing affirmance of jury verdict on any evidence where party failed to move for directed verdict). Counsel for the County did move for a directed verdict in regard to several defendants in their individual capacities, but the record does not indicate a motion for a directed verdict on behalf of Sheriff Klevenhagen or the County. Steverson asserts that the County did not move for a directed verdict, and the County does not claim otherwise.

avoid the conclusion that the jury's findings conflict with one another, if the facts of the case permit.[5]

III.

The County first argues on appeal that the district court erred in its conclusion that the Civil Service Commission violated Steverson's rights to due process and equal protection. The court based this conclusion on the language of the Harris County Sheriff's Department Civil Service Regulations and the manner in which the Commission implemented those regulations. The regulations empowered the Commission to "modify" disciplinary actions in response to an appeal by an employee. The court interpreted the regulations as not allowing the Commission to augment a disciplinary action. It also noted that Steverson received no notice that an appeal could result in an increased sentence, and that Steverson's was the first and only case among several hundred appeals in which the Commission increased a sentence. We need not assess the County's arguments that the court erred in its analysis because the jury verdict provides adequate alternative grounds for affirmance.

The jury found that race played a part in the Commission's treatment of Steverson.[6] The County contests the

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5 *See Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973) ("The Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly."). *See also Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1178 (5th Cir. 1987).

jury's finding of racial discrimination only on the grounds of inadequate evidence. Our inquiry is limited to whether there is any evidence to support the jury's verdict under 42 U.S.C. § 1983. There is. The Commission took an unprecedented step in increasing, rather than decreasing or leaving intact, Steverson's punishment. The original sanction of Steverson stemmed from a racial conflict and, the jury concluded, race played a part in the Sheriff's and then the Commission's decision to affirm it. Steverson can recover for the harm he suffered because of the Commission's actions. We need not decide more.

The County also argues that the district court erred by applying retroactively the 1991 Amendments to the Civil Rights Act, and by allowing Steverson to proceed under 42 U.S.C. §§ 1981 and 1983 on his claim of retaliation for his Title VII class action suit. We need not address these assertions because, regardless of their merit, the jury's findings require affirmance.[7] Klevenhagen acknowledged that he was aware that Steverson

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6 The County does not argue on appeal that the jury failed to find that racial discrimination was a sufficiently strong motive to satisfy 42 U.S.C. § 1983. We therefore do not address the issue.

7 *But see Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994) (holding that 1991 Civil Rights Act jury trial and compensatory damages provisions do not apply retroactively); *Irby v. Sullivan*, 737 F.2d 1418, 1429 (5th Cir. 1984) (holding that 42 U.S.C. § 1983 does not provide claim based on retaliation against party for suit under Title VII, but that 42 U.S.C. § 1981 does); *Carter v. South Cent. Bell*, 912 F.2d 832, 840-41 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2916 (1991) (interpreting *Patterson v. McLean Credit Union*, 491 U.S. 164, 179-80 (1989) to foreclose claim under 42 U.S.C. § 1981 for retaliation in response to suit under Title VII).

backed Klevenhagen's opponent, J.C. Mosier, in the race for Sheriff of Harris County. Klevenhagen was present at a meeting that Steverson attended in support of Mosier. Five days after Steverson spoke on a local radio show on behalf of Mosier, Steverson received an undesirable work assignment. Steverson testified that Klevenhagen was responsible for the assignment. There was some evidence to support the jury's finding that Klevenhagen retaliated against Steverson for political activity. This finding together with the jury's determination that racial animus was a motive for the Commission's and Sheriff Klevenhagen's actions support the jury's verdict.

The County next contends that the district court erred in holding it liable for Klevenhagen's actions.[8] The County argues that Klevenhagen lacked final policymaking authority and that the punishment he meted out to Steverson, based on race and in retaliation for Steverson's First Amendment activities, cannot result in its liability. The County concludes that Klevenhagen's "actions cannot be imputed to the County because he is not the final decision maker and because of the Commission's subsequent actions in reviewing the discipline."[9]

The jury found that an unconstitutional consideration informed the County's decision to suspend Steverson for a total of ten days. We refuse to parse this decision into affirmance of the three-day suspension that Steverson originally received on an

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8 The County does not contest its liability for the Commission's actions.

9 The focus of the County's appeal on this point is unclear. Because the County refers to the Commission's review of the sheriff's actions, we interpret the County as objecting to liability for affirming the sanctions against Steverson that the Sheriff's Department imposed.

unconstitutional basis and that the County affirmed, and the County's decision that a ten-day suspension was more appropriate. Discretion lay with the County whether and how to sanction Steverson. The jury and judge found that race played a part in the County's exercise of its discretion. The County is liable.

Finally, the County seizes on the finding that the sheriff's policy of disciplining black employees more severely than white employees was not a moving force in the violation of Steverson's constitutional rights. The County objects that the district court nevertheless found disparate treatment, relying in part on an incident involving a white deputy who, after slapping a black sergeant, received no sanction comparable to Steverson's. The quick answer is that the jury's determination that racial animus motivated the County's suspension of Steverson supports the judgment. The district court prudently added its own findings. Although ultimately such additional findings may prove to be unnecessary, it is wise to make them when simultaneously trying jury and nonjury claims.

IV.

Steverson argues by cross-appeal that the court should have instructed the jury to consider the personal liability of Klevenhagen and other individuals on his staff for their discriminatory and retaliatory acts. The district court held that Klevenhagen and the other named defendants were not individually liable because they were entitled to immunity as policymakers. At oral argument, Steverson waived this claim, should we affirm the judgment against the County. We dismiss the cross-appeal on Steverson's motion.

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

Appendix B

APPENDIX B – FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED FEBRUARY 14, 1992 – *S.W. STEVERSON, JR. V. LEON GOLDSTEIN, ET AL.*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-2493

S. W. STEVERSON, JR.,

Plaintiff,

V.

LEON GOLDSTEIN, ET AL.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Although the Court submitted what it considers to be appropriate instructions and issues, under Section I for a jury instructions on the plaintiff's Title VII and § 1983 claims, out of an abundance of caution and in the event that the Circuit Court disagrees with the propriety or substance of the submission, the following findings of fact and conclusions are entered:

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FINDINGS OF FACT

1. In plaintiff's, S. W. Steverson, Jr., cause of action under 42 U.S.C. § 2000e *et seq.* ("Title VII"), Steverson contends that he was discriminated against because of his race, black, and retaliated against for filing an EEOC charge and a civil rights lawsuit. Steverson contends that the actions of Harris County, by and through the Harris County Sheriff's Department Civil Service Commission, have resulted in his wrongful suspension, wrongful increase of suspension, probation, and loss of pay. Steverson seeks all lost pay, lost benefits, prejudgment interest, and reasonable attorney fees. Additionally, Steverson asks the Court to purge his records of his three day suspension without pay, 90-day probation, and the additional seven (7) day suspension from duty without pay.

2. Steverson has been employed as a deputy with the Sheriff's Department since April 1979.

3. For many years, Steverson, who is black, and other black employees have suffered continuing racial discrimination in terms and conditions of employment. Eventually, Steverson and other black employees filed charges of racial discrimination with the Equal Employment Opportunity Commission ("EEOC"). Upon receiving notice of right to sue from the EEOC, Steverson joined other blacks on January 12, 1989, in filing a class action suit in United States District Court, naming Sheriff Johnny Klevenhagen ("Klevenhagen") and Harris County ("the County") as defendants. The lawsuit is styled and numbered *Robert E. Connor, et al. v. Harris County, et al.*, Civil Action No. H-88-0078, and filed in the United States District Court, Southern District of Texas, Houston Division. Steverson and the other eight plaintiffs in the *Connor* suit were

all active members of the Afro-American Sheriff's Deputy League.

4. During the night and morning of February 27-28, 1988, Steverson was working an extra job as security at the U. W. Watkins Country Club at 3714 Anderson Road, Houston, Texas. The approximately 600 patrons at the U. W. Watkins Country Club were mostly from the Prairie View Trail Riders group and were virtually all black.

5. At the time Steverson was on duty, Deputy Denise McNeil was also working an extra job as security at the club. McNeil reported a possible burglary in progress at a nearby location. Eventually, a member of the Harris County Sheriff's Department, Sergeant Mark A. Walker, a white officer, was dispatched to the scene next to the Club.

6. Sergeant Walker has a history, in the Harris County Sheriff's Department, for using racial slurs. For instance, Walker was reported by Deputy Alton Dickey, a black, and by past League President Connor, black, for referring to suspects in roll call as "those niggers." In fact, Connor reported the matter directly to Klevenhagen. On other occasions, Walker has used racial slurs with members of the Harris County Sheriff's Department, such as Curtis Brown and Charles Whitsey, both of whom are black. Despite being reported for using racial slurs, Walker had never been disciplined for such racial slurs.

7. Sometime after arriving on the scene of the possible burglary, Walker came to the Club where Steverson was working. Once inside the Club, Walker verbally attacked Steverson in a racial manner without cause and in the presence of the night club customers. Steverson advised Walker that

Steverson would report Walker's improper decorum. Racial tensions grew. Walker retired outside the Club. The Club owner went outside to query Walker. Walker later alleged that at one point, he, Walker attempted to arrest the owner of the Club, who was protesting Walker's abuse of Steverson and the disruption of the Club's business. Although Steverson and Walker exchanged words outside the Club, no physical altercation occurred and no one was arrested.

8. Steverson reported Walker's actions of February 28, 1988, including the use of vulgar and volatile language to the appropriate supervisors and personnel. In retaliation for reporting the improper actions of Sergeant Walker, Steverson was given a three day suspension and placed on 90 days probation. This probation prevented Steverson from working his second job. But more importantly, Steverson was instructed to not work at the Club again.

9. The handling of the Steverson-Walker occurrence is in contrast to the handling of discipline problems involving an occurrence between a higher ranking black, Sergeant Perry Winston, and a lower ranking white, Deputy Sharon McConnell.

10. Subsequent to the Steverson-Walker occurrence, Sergeant Winston, a black, gave Deputy McConnell, a white, an oral reprimand. Such reprimand was consistent with Perry's duties as Sergeant. In response to Winston's reprimand, McConnell slapped and pushed Winston. The insubordination was reported to Winston's supervisors. Instead of disciplining McConnell, Captain C. W. Rusk gave Winston a written reprimand allegedly for "handling the matter badly." McConnell received no discipline for her conduct.

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11. Pursuant to the disciplinary rules and regulations of the County as carried out by the Harris County Sheriff's Department Civil Service Commission, under Article 158.031 *et. seq.*, Local Government Code, Texas Revised Civil Statutes, if an employee is not satisfied with the discipline received at the first level and believes such discipline is not fair, he may appeal the discipline to the Commission. Pursuant to such policy, Steverson appealed his discipline.

12. The Commission's handling of grievances is governed by the Harris County Sheriff's Department Civil Service Regulations. Rule 13, Grievances, of the Regulations addresses the legislative intent of the Commission. Section 13.01 Purpose, reads "The purpose of this rule is to provide a forum for an employee of the Harris County Sheriff's Department to present a grievance to the administrators of that Department, without fear of reprisal or harassment, for prompt and fair consideration." Section 13.02(b), Basis Assumptions, reads ... "the grievance procedure is a positive process which seeks to improve morale, discipline, and the functioning of the Department."

13. The Commission heard Steverson's grievance. Instead of affirming or reducing the discipline from which Steverson appealed, the Commission ordered that Steverson's three day suspension and 90 days probation be increased by an additional seven day suspension without pay.

14. In its decision dated January 25, 1989, the Commission cited as the basis for its decision Rule 12.04(i)2 of the Regulations. Rule 12.04(i)2 standing alone reads: "The Civil Service Commission may ... modify disciplinary action as it may deem appropriate." When Rule 12.04(i)2 is read in conjunction with the Regulations, and especially juxtaposed with Rule 12,

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Sections 13.01 and 13.02, it is clear that the Commission lacks the power to increase the discipline of an appellant beyond the discipline from which the appellant appealed.

15. At the time Steverson appealed his discipline to the Commission, neither the Commission nor its agent had given Steverson notice that the Commission could impose a harsher discipline than the discipline appealed. Based on its past practice, the Commission provided Steverson no basis to know, nor expect, that the Commission could increase Steverson's discipline. From the beginning of the Commission in 1982 until at least January 25, 1989, Steverson is the only employee among the several hundreds of appeals heard to have had his discipline increased by the Commission on appeal.

16. Klevenhagen, the members of the Commission and the County knew by February 27-28, 1988, that Steverson had filed an EEOC charge and lawsuit against Klevenhagen and the County.

17. By letter dated May 10, 1988, Klevenhagen personally refused Steverson's request to revoke or modify Steverson's suspension. Klevenhagen's refusal was done approximately four months after the *Connor* suit was filed.

18. The actions of Klevenhagen and the Commission were actions of retaliation. But for Steverson's filing an EEOC charge and a civil rights lawsuit, Steverson would have received no discipline or no more than a letter of reprimand for the occurrence involving Walker. Steverson's discipline would not have been increased by the Commission.

19. In view of the fact that during the entire history of the Commission, Steverson is the only employee appealing his

3. Steverson is an employee within the meaning of 42 U.S.C. §2000e *et seq.*; the County, through its agents, the Commission, is an employer within the meaning of 42 U.S.C. §2000e *et seq.* Article 158.031 *et seq.*, Local Gov. Code, Texas Revised Civil Statutes.

4. Where direct evidence of discrimination is introduced, the plaintiff need not meet the *McDonnell Douglas*, formula. *Young v. City of Houston, Tex.*, 906 F.2d 177, 1180-181 (5th Cir. 1990). *See Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982). [Where a case of discrimination is made out by direct evidence, reliance on the four-part test developed for circumstantial evidence is obviously unnecessary. *Citing Ramirez v. Sloss*, 615 F.2d 163, 168 & n.9 (5th Cir. 1980); *Crawford v. Western Electric Co. Inc.*, 614 F.2d 1300, 1315 (5th Cir. 1980).] Where evidence establishes that an employer openly discriminates against an individual, it is not necessary to apply the mechanical formula of *McDonnell Douglas* to establish an inference of intentional discrimination. *Ramirez, supra*, 168.

5. Even in those instances wherein the *McDonnell Douglas* formula is used, the formula is not inflexible. Facts will vary in cases under the Act, and the specification of the prima facie proof required from a plaintiff is not necessarily applicable in every respect to differing factual situations. *International Brotherhood of Teamsters v. United States*, 52 L.Ed.2d 396 (1977).

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6. In Title VII cases, the plaintiff must establish that discrimination was intentional. Proof of such discrimination can be established by indirect and circumstantial evidence. *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978). *United States Postal Service Bd. of Governors v. Aikens*, 460 U. S. 711, 75 L.Ed.2d 403, 103 S.Ct. 709, 715 (1983).

7. In a case alleging disparate treatment under Title VII, "proof of discriminatory motive is critical." *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 335 n.15 (1976), 52 L.Ed. 2d 396 (1977); *Cisneros v. Frosch*, 23 EPD Paragraph 31, 121 (S.D. Tex. 1980). The Fifth Circuit noted in *Barnes v. Yellow Freight Systems, Inc.*, 778 F.2d 1096, 1101 (1985):

* * *

> When a supervisor of one race treats employees of the same race more favorably than similarly situated employees of another race under circumstances that are essentially identical, a presumption of discriminatory intent is raised. This presumption arises because we assume that an employer acts on the basis of some underlying reason, either legitimate or not. Consequently, if there is no apparently legitimate reason for a white supervisor's alleged disparate treatment of a black employee, it is more likely than not that the supervisor based the decision on an impermissible consideration such as race. See *Furnco*, 438 U. S. at 577, 98 S.Ct. at 2950.

8. Title VII affords the employee broad protection from retaliation in order to effectuate the purpose of Congress in enacting the remedial legislation. *Whatley v. Metropolitan Atlanta Rapid Transit*, 632 F.2d 1325, 1328 (5th Cir. Unit B. 1980). In a retaliation case, the plaintiff may establish a prima

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13. Steverson is awarded prejudgment interest at the rate of 6% per annum. *Canvar Quality Control Parking, Inc.*, 696 S.W.2d 549 (1985); *Channel 20, Inc. v. Tower Services, Inc.*, 607 F.Supp. 551 (S.D. Tex. Houston Div. 1985).

14. Steverson is awarded reasonable attorney fees in the amount of $50,000.00 pursuant to *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). Trial counsel performed 250 hours of work which the Court finds is reasonable. The Court also finds that $200.00 per hour is a reasonable rate for like or similar suits, based on trial counsel's experience and complexity of the case.

15. To the extent that any of the findings of fact constitute conclusions of law, they are adopted as such. To the extend that any of the conclusions of law constitute findings of fact, they are adopted as such.

Costs of court in the amount of $1,962.48 is awarded to the plaintiff.

SIGNED this 13th day of February, 1992.

s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

Appendix C

APPENDIX C – COURT'S INSTRUCTIONS TO THE JURY FILED JANUARY 14, 1992 – *S.W. STEVERSON, JR. V. LEON GOLDSTEIN, ET AL.*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-2493

S. W. STEVERSON, JR.,

Plaintiff,

V.

LEON GOLDSTEIN, ET AL.,

Defendants.

COURT'S INSTRUCTIONS TO THE JURY

The following instructions were presented to the jury on the 14 day of January, 1992.

s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

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MEMBERS OF THE JURY:

Now that you have heard all the evidence and the arguments of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

DUTY TO FOLLOW INSTRUCTIONS

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of laws does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

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This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A law enforcement official, a governmental body, and a private individual are each entitled to the same fair trial at your hands. The law is no respecter of persons, and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

EVIDENCE

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyer are not evidence in the case. The function of the lawyer is to point out those things that are more significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

And you should not be concerned about whether the evidence is direct or circumstantial. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

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So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inference from the testimony and exhibits you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

WITNESSES

I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness you should consider the following: his or her relationship to the plaintiff or to the defendant; his or her interest, if any, in the outcome of the case; his or her manner of testifying; his or her opportunity to observe or acquire knowledge concerning the facts about which he or she testified; his or her candor, fairness and intelligence; and the extent to which he or she has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

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The testimony of a law enforcement officer or government official is entitled to no special or exclusive sanctity. A law enforcement officer or government official who takes the witness stand subjects his testimony to the same examination and the same tests that any other witness does, and in the case of law enforcement officers or government officials you should not believe them merely because they hold an official position. People employed by the government, including law enforcement officers, do not stand in any higher station in the community than other persons, and their testimony is not entitled to any greater weight.

IMPEACHMENT

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

BURDEN OF PROOF

The burden is on the plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved

is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all witnesses, regardless of who may have called them and all exhibits received in evidence regardless of who may have produced them. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence. You should find for the defendant(s) as to that claim.

SECTION I – CIVIL RIGHTS

Deputy Stevenson claims that the defendants' action against him amounted to racial discrimination and/or retaliation. In this regard he must prove purposeful, intentional discrimination.

In proving purposeful, intentional discrimination, plaintiff Steverson is not required to produce direct proof of unlawful motive, intent or design. A motive, intent or design to violate a person's civil rights, if its exists, is seldom admitted and may be inferred from the existence of other facts.

Although Deputy Steverson must prove in his equal protection claim that discrimination based on race and/or retaliation was intentional, he need not prove that race and/or retaliation was the sole motivation or the primary motivation.

In this case the plaintiff claims that he was damaged when the defendants violated his civil rights. Specifically, the plaintiff claims that the defendants "retaliated" against him when (a) he exercised his First Amendment right to participate in and

to speak out in the Harris County Sheriff's race in 1988, and (b) when he participated in filing a civil rights suit against the Sheriff and Harris County in 1988. The plaintiff's claims implicate 42 U. S. C. §§ 1981 and 2000e.

Section 1981 provides that:

> All persons ... shall have the same rights in every State ... to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws ... as is equal benefits of all laws ... as is enjoyed by white citizens.

Section 2000e(2) states in part:

> It shall be unlawful ... for an employer to ... discriminate against any individual with respect to ... terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

In order for the plaintiff to establish a prima facie case of retaliation in violation of his right to file a civil rights lawsuit, the plaintiff must establish:

a) that he filed a civil rights lawsuit challenging racial discrimination within the Sheriff's department;

b) that he was disciplined after he filed the suit; and

c) that a causal link exists between the discipline and the suit filed.

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You are instructed that an employee enjoys the unfettered right to file a civil right suit against his employer without fear of reprisal.

In the event you find that one or more subordinate employees did violate the plaintiff's civil rights, you may not find a superior officer, such as the Sheriff, liable merely because he is a superior officer. You must find that the Sheriff expressly or otherwise knew of and participated or acquiesced in the constitutional deprivation of the plaintiff's civil rights.

A public employee, such as the plaintiff, has a right to exercise protected freedom of speech guaranteed under the First Amendment, i.e., to speak for or against any candidate seeking public office.

In order for the plaintiff to prevail on his First Amendment claim he must establish:

a) that his activity (speaking on behalf of the sheriff's opponent) was constitutionally protected;

b) that one or more of the defendants took adverse action (discipline) against him; and

c) that the plaintiff's activity was a substantial or motivating factor in the decision to take disciplinary action against the plaintiff.

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You must find more than merely that the discipline followed the speech. You must find from a preponderance of the evidence that one or more of the defendants specifically took the action that was taken for the purpose of retaliating against the plaintiff for his speech.

You are instructed that participation in a political campaign or the making of a speech for a particular candidate is protected speech.

NUMBER 1:

Do you find from a preponderance of the evidence that [Sheriff] Johnny Klevenhagen, [or the Commission] ~~Leon Goldstein~~, or ~~Johnny Isbell~~ retaliated against the plaintiff because the plaintiff exercised his First Amendment right to participate in the 1988 sheriff's race, and that such act(s) was a proximate cause of the violation of the plaintiff's constitutional rights?

Answer "Yes" or "No" as to each defendant.

a) Sheriff Johnny Klevenhagen yes

b) Civil Service Commission no

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NUMBER 2:

Do you find from a preponderance of the evidence that [Sheriff] Johnny Klevenhagen, [or the Commission] ~~Leon Goldstein, or Johnny Isbell~~ retaliated against the plaintiff because he participated in filing a civil rights suit against the Sheriff and Harris County in January 1988, and that such act was a proximate cause of the violation of the plaintiff's constitutional rights?

Answer "Yes" or "No" as to each defendant.

a) Sheriff Johnny Klevenhagen yes

b) Civil Service Commission no

NUMBER 3:

Do you find from a preponderance of the evidence that the plaintiff's race played a part in the discipline given by the Sheriff, or the increased discipline given by the Commission?

Answer "Yes" or "No" as to each defendant.

a) Sheriff Johnny Klevenhagen yes

b) Civil Service Commission yes

If you have answered "Yes" as to any defendant in Interrogatory Nos. 1, 2 or 3, then proceed to Section II; if not, proceed to Section III.

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SECTION II
COUNTY LIABILITY POLICY OR CUSTOM

The plaintiff claims that Harris County is liable to him for the constitutional deprivations that he alleges. You are instructed that Harris County may be liable where you find that the plaintiff was deprived of his constitutional rights and such deprivation was done pursuant to a governmental custom, policy, ordinance, regulation or decision. When a person is injured as a result of a government's policy, custom, regulation or decision, whether made by its lawmakers or by those officials whose edicts or acts may fairly be said to represent official policy, the County itself is responsible for the injury that it causes.

"Official policy" means a policy statement, ordinance, regulation, or decision that is officially adopted by the county lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority. You are instructed that Sheriff Klevenhagen and the Commissioners have policymaking authority.

Official policy also means a persistent, widespread practice of the county officials or employees which, although not an authorized and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents policy.

In the latter definition, a showing of actual knowledge of the custom is unnecessary. Knowledge is attributed to the governing body of the County or to an official to whom that body had delegated policy-making authority. A policy is a course of action consciously chosen from among various alternatives.

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The plaintiff claims that the Sheriff has a policy or custom of disciplining the black deputies more severely than the Caucasian deputies. In this case, the plaintiff contends that it was the exercise of that policy of disparate treatment that resulted in the discipline given to the plaintiff. It is also the plaintiff's contention that the increased discipline given by the Civil Service Commission was merely an extension of the policy or custom practiced by the Sheriff.

A policy of disparate treatment does not exist unless it is shown that the discipline given resulted from a conscious choice; that is, proof that the policy makers deliberately meted out a more severe punishment to the plaintiff on the occasions in question than is meted out to Caucasian deputies similarly situated.

In this regard, the plaintiff must show that:

1) he is a member of the protected group (i.e., black [or] ~~and~~ filed a complaint or law suit.);

2) there was an employer's policy or practice concerning the activity for which he was disciplined;

3) employees not in the protected group either were given the benefit of a lenient policy or practice or were not held to compliance with the strict policy or practice; and,

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4) he was disciplined either without the application of the lenient policy or practice or was disciplined in conformity with the strict policy.

Once the plaintiff makes a prima facie case, an employer may rebut the plaintiff's case by articulating a legitimate non-discriminatory reason for the differential treatment.

NUMBER 4:

Do you find from a preponderance of the evidence that the Harris County Sheriff disciplined black deputies more severely than white deputies?

Answer "Yes" or "No."

Answer: yes

If you answer "Yes" to Interrogatory No. 4 and only in that event, answer Interrogatory No. 5.

NUMBER 5:

Do you find that the policy found in Interrogatory No. 4 was a moving force in the violation of the plaintiff's constitutional rights?

Answer "Yes" or "No."

Answer: no

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SECTION III
CIVIL RIGHTS - 42 U. S. C. § 1983 AND THE FOURTEENTH AMENDMENT

The plaintiff also claims damages for violation of 42 U. S. C. § 1983, because he was deprived of "due process" and "equal protection" of the law guaranteed by the Fourteenth Amendment. The Court has determined that the Commission violated the plaintiff's "due process" and "equal protection" guarantees when they voted to increase the plaintiff's discipline.

Nevertheless, you will be required to determine what damages, if any, were sustained by the plaintiff on this account.

DAMAGES

Just because I have directed a verdict for the plaintiff on his Fourteenth Amendment claims and am instructing you on how to award damages does not mean that I have any opinion on whether or not the defendant(s) should be held liable on the other claims or what damages, if any, ought to be assessed.

If you return a verdict for the plaintiff, then you must award him such sum of money as you believe will fairly and justly compensate him for any injuries you believe that he actually sustained as a direct consequence of the conduct of the defendant(s).

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In considering the issue of the plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as fully, just, and reasonable compensation for all the plaintiff's damages, no more and no less. Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial and only on that evidence.

On the other hand, compensatory damages are not restricted to actual loss of time or money, they cover personal humiliation, emotional distress, and mental anguish.

You shall award actual damages only for those injuries which you find that plaintiff has proven by a preponderance of the evidence.

If you have answered any of the preceding Interrogatories 1 through 5, "Yes", and only in that event, answer Interrogatory No. 6.

NUMBER 6:

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Deputy Steverson for lost earnings, personal humiliation, emotional distress, and mental anguish?

Answer in dollars and cents, if any,

Answer: $ 200,655

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Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in Court.

Forms of verdict have been prepared for your convenience. You will take these forms to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date, and sign the form which sets out the verdict upon which you have unanimously agreed, and then return with your verdict to the courtroom.

The verdict must represent the considered judgment of each juror. In order to return the verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges--judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

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If it becomes necessary during your deliberations to communicate with the Court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the Jury. No member of the Jury should even attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the Jury on any subject touching the merits of the case otherwise than in writing or orally here in open Court.

Bear in mind, also, that you are never to reveal to any person--not even the Court--how the Jury stand, numerically or otherwise, on the questions before you until after you have reached a unanimous verdict.

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CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into Court as our verdict.

Date 1/14/92

s/ Patricia A. Davis
Presiding Juror

Appendix D

APPENDIX D – FINAL JUDGMENT ENTERED APRIL 2, 1992 – *S.W. STEVERSON, JR. V. LEON GOLDSTEIN, ET AL.*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-2493

S. W. STEVERSON, JR.,

Plaintiff,

V.

LEON GOLDSTEIN, ET AL.,

Defendants.

FINAL JUDGMENT

Based on the Court's findings of fact and conclusions of law and the jury's findings of fact, it is the opinion of this Court that judgment should be entered for the plaintiff, S. W. Steverson, Jr. against the defendant, Harris County as follows:

Actual damages (42 U.S.C. §1983)	$200,655.00
Pre-judgment interest at the rate of 6% per annum from April 1989 to the date of entry of this judgment.	
c) Attorneys fees	$50,000.00

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d) Post-judgment interest at the rate of 4.58% per annum compounded

Costs of Court $1,962.48

This is a FINAL JUDGMENT.

SIGNED this 30th day of March, 1992.

s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

Appendix E

APPENDIX E – ORDER FILED JULY 21, 1994 –IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2205

S. W. STEVERSON, JR.,

Plaintiff-Appellee,
Cross-Appellant,

versus

LEON GOLDSTEIN, ET AL.,

Defendants-Appellants.

LEON GOLDSTEIN, JOHNNY ISBELL
and JOHNNY KLEVENHAGEN,

Defendants,
Cross-Appellees.

Appeals from the United States District
Court for the Southern District of Texas

Appendix E

ON PETITION FOR REHEARING
(JULY 21, 1994)

Before HIGGINBOTHAM and WIENER, Circuit Judges, KAUFMAN,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is **denied**.

ENTERED FOR THE COURT:

s/ Patrick Higginbotham
United States Circuit Judge

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* District Judge of the District Court of Maryland, sitting designation.

APPENDIX F – CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

42 U.S.C. § 1981 (as amended by R.S. § 1077; Pub. L. 102-166, Title I, § 101, Nov. 21, 1991, 105 Stat. 1071)

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

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28 U.S.C. § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000e-2 Unlawful employment practices-Employer practices

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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42 U.S.C. § 2000e-3. Other unlawful employment practices - Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-5 Enforcement provisions-Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a

date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 1981a (effective Nov. 21, 1991)
Damages in cases of intentional discrimination in employment

(a) Right of Recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5) [42 U.S.C.A. § 2000e-5 or 42 U.S.C.A. § 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. § 2000e-2 or 2000e-3) [42 U.S.C. § 2000e-2, 42 U.S.C. § 2000e-3, or 42 U.S.C. § 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights act of 1964 [42 U.S.C. § 2000e-5(g)], from the respondent.

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* * *

(b) Compensatory and Punitive damages

(1) Determination of punitive damages.

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Exclusions from compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party-

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000. . .

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury Trial

If a complaining party seeks compensatory or punitive damages under this section-

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.